



The
NEGLIGENCE LAW SECTION
respectfully submits the following position on:

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HB 5851 / SB 1123

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The Negligence Law Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Negligence Law Section only and is not the position of the State Bar of Michigan. To date, the State Bar of Michigan does not have a position on this matter but does oppose any provision that calls for a limit on attorney compensation and provides for sanctions against an attorney for violating the set limits.

The total membership of the Negligence Law Section is approximately 2,887.

The position was adopted after discussion and vote by the Negligence Law Section's Council. The number of members in the decision-making body is 13. The number who voted in favor to this position was 12. The number who voted opposed to this position was 1.

**NEGLIGENCE SECTION OF MICHIGAN
BAR ASSOCIATION'S COMMENTS OF
HOUSE BILL NUMBER 5851 (AS AMENDED)**

After consideration of the House Bill 5851 provisions creating a judicially-determined medical requirement standard for individuals or estates claiming injuries from exposure to asbestos-containing products and/or materials, the section would oppose the passage of the Bill as conceived. This opposition is based upon the following:

1. The section would oppose legislation that establishes a separate standard and procedure for subclasses of actions or certain categories of litigants, absent a substantial showing to support disparate treatment.
2. The legislation in adopting a specific standard for injuries related to asbestos provides a judicial determination of a factual issue, contrary to common law practice and deprives Michigan residents of a jury determination of their claims of injury.
3. That the statute in providing for a judicial determination regarding medical criteria will create a de novo review by appellate courts and create a greater judicial backlog to all Michigan litigants.

The underlying premise in the proposed legislation is that there exists a necessity for creating a special legislative standard which would be imposed by the judiciary for individuals or their estates claiming injury from an asbestos-related product. Such a requirement not only places a greater burden on those individuals as opposed to individuals claiming the same or similar injury or damages from a different chemical or product, but substitute a judicially-imposed determination in place of a party's right to have a jury determination of their claim. The negligence committee believes that the right of any party to have a jury determination of their factual claims is the very basis of our judicial system. The legislature should consider carefully any provision which attempts to take away this fundamental right unless there is an overwhelming rationale for doing so. The legislature should also consider the impact of this legislation in setting a precedent for allowing statutory erosion of individual and corporate rights to a jury determination.

The negligence section believes that there has not been established in Michigan any substantial basis for creating a separate subclass or depriving such individuals, as well as the Defendants their right to have a jury determination of the issue of whether an individual is injured.¹ The legislation is based upon an unfounded belief that there exists a "crisis" of asbestos litigation in this state. The "crisis" of asbestos litigation is a regional problem. The "crisis" exists where courts have been inundated by tens of

¹The negligence section's position is also supported by the Civil Procedure and Courts Committee's position to the imposition of medical standards under the Supreme Court Order. See attachment "1".

thousands of cases, creating an unmanageable problem and overburdening the courts' resources which effect all litigations in the region. The "crisis" exists where these tens of thousands of claims are supported by a few unscrupulous medical practitioners whose opinions and procedures would not be admissible under current Michigan evidentiary standards. The "crisis" exists in regions where there exists joint and several liability and/or punitive damages which allow a party who has been determined to be as little as one percent liable to be responsible for all damages and subject to a repeated threat of punitive damage awards.

The factors that create these "crises" do not exist in the state of Michigan. In this state, this legislature has already enacted tort reform legislation capping damages and precluding joint and several liability. Further, this state does not allow the imposition of repetitive punitive damages of any type.

The "crisis" does not exist in our state where the current system is further controlled by a Case Management Order developed in an unprecedented, cooperative effort by our judiciary and counsel for all parties. This is an Order which has been in place unchallenged for almost 20 years providing a cooperative framework from which asbestos claims in Michigan are resolved with little, if any, judicial involvement.

In enacting this legislation, the legislature not only throws out the work which has been done by all the parties and the judiciary regarding asbestos litigation in the last 20 years, but puts into effect a procedure which will lead to further delay and strain on the state's courts' resources and personnel.

In creating a medical criteria standard to be determined by the trial court, the legislation will create a legal standard subject to judiciary review. As such, any determination made on a request to dismiss a claim for failing to meet the standard will be entitled to a de novo review by the appellate courts (*Kreiner v. Fisher*, 471 Mich 109, 129 (2004)). The legislator need only look as to recently-imposed standards as part of our tort reform to see how the imposition of a standard can impact all litigants and all courts. In reforming claims under Michigan no-fault law, the legislation enacted a standard whereby a party could not make a claim unless they could demonstrate that they had a serious impairment. MCL 500.3135(7) The issue of what constitutes a serious impairment has been litigated and appealed since the enactment of the statute. In 2004, the Michigan Supreme Court in the case of *Kreiner v. Fisher*, 471 Mich 109, 131-134 (2004) attempted to establish a framework by which a trial court could determine whether the criteria required under the statute is met. Decisions by the trial courts on whether this class of individuals met this requirement has been appealed over 100 times since the Supreme Court issued their opinion. In the month of April of this year alone, the Court of Appeals issued 14 separate decisions on whether or not an individual was able to establish this standard.²

The proposed legislation, rather than relieving the unsupportable claim that asbestos

²The 14 cases are set forth attachment "2".

litigation has created a "crisis" will instead be creating the very "crisis" it is attempting to avoid. Cases will be delayed during the appeal process and non-asbestos appeals will be delayed as the appellate courts will be repeatedly required to make de novo determinations on whether the medical criteria contained in the legislation is met. The adoption of the legislation as proposed will thereby not only prejudice the parties involved in asbestos litigation in obtaining a timely determination of their claims, but will affect all litigants in obtaining a prompt appellate review throughout the state of Michigan.

The legislative purpose for HB 5851 is to provide a procedure whereby there can be a timely and equitable determination of claims relating to alleged asbestos injuries. Such a procedural framework has already been in place for almost 20 years as constructed by the parties and the judges involved in the litigation. The Section would urge the legislature rather than replacing a working system with a new procedure fraught with the problems outlined above that the legislature look to in enacting a procedural framework based upon the system which is in place.

ATTACHMENT "2"

	<u>Date</u>	<u>Case Name</u>	<u>Citation</u>
1.	4/25/06	Jones v. Wheelock	2006 Mich App Lexis 1473
2.	4/25/06	Kitchen v. Soyka	2006 Mich App Lexis 1461
3.	4/25/06	Ashcraft v. McLaughlin	2006 Mich App Lexis 1435
4.	4/20/06	Collins v. Ranyavajau	2006 Mich App Lexis 1235
5.	4/18/06	Welch v. Yuhl	2006 Mich App Lexis 1224
6.	4/18/06	Eichler v. Walke	2006 Mich App Lexis 1207
7.	4/18/06	Sinew v. Bowerman	2006 Mich App Lexis 1152
8.	4/11/06	Madkins v. Lynch	2006 Mich App Lexis 1137
9.	4/11/06	Martin v. Southorn	2006 Mich App Lexis 1125
10.	4/6/06	Hosey v. Berry	2006 Mich App Lexis 1072
11.	4/4/06	Biazzi v. Bazzi	2006 Mich App Lexis 943
12.	4/4/06	Houston v. Collier	2006 Mich App Lexis 939
13.	4/4/06	Lester v. Morningstar	2006 Mich App Lexis 932
14.	4/4/06	Regneras v. Passow	2006 Mich App Lexis 931